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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

United States of America,  
Plaintiff,  
v.  
Michael Leroy Witt,  
Defendant.

No. CR-23-00389-001-TUC-JCH (EJM)

## ORDER

Before the Court are the Government's "Motion in Limine to Admit Material Witnesses' Video Depositions," Doc. 103, and "Motion in Limine to Admit Defendant's Prior Felony Convictions." Doc. 104. In his trial brief, Defendant stated that he had no objection to the Video Deposition MIL and that the Prior Felony MIL was irrelevant because Defendant did not intend to testify at trial. Doc. 118 at 1. But Defendant then filed an untimely response to the Prior Convictions MIL, Doc. 128, and explained at the final pretrial conference that he in fact does object to aspects of the Video Deposition MIL. See Doc. 138 Hearing Transcript. The Court took both MILs under advisement, *see id.*, and this is its resolution of them.

## **I. Video Deposition MIL (Doc. 103).**

The Government seeks to admit the videotaped depositions of two unavailable material witnesses. *See* Doc. 103 at 1. The Government also seeks a ruling on Defendant's objections to certain portions of the depositions. *See id.* at 1, 3-4. At the final pretrial conference, Defendant clarified that he also seeks a ruling on his objections to the

1 depositions. *See Doc. 138 Hearing Transcript.*

2 Videotaped depositions may be introduced at trial if the witnesses are unavailable  
 3 due to deportation or removal, provided they were available for cross-examination and the  
 4 deposition otherwise complies with the Federal Rules of Evidence. 8 U.S.C. § 1324(d).  
 5 Leading questions are not permitted on direct examination except as necessary to develop  
 6 the witness's testimony. Fed. R. Evid. 611(c).

7 First, the Court will grant in part the Government's motion to admit the videotaped  
 8 depositions under 8 U.S.C. § 1324(d). The witnesses are unavailable, and the deposition  
 9 otherwise complies with the Federal Rules of Evidence except in one respect, discussed  
 10 next.

11 Second, the Court will deny in part the Government's Motion because two of its  
 12 objected questions were impermissibly leading. The Government's Motion specifies three  
 13 sets of questions to which Defendant objected. Defendant's objection to the first question  
 14 is overruled. *See Doc. 103 at 3:15–17.* The question is not impermissibly leading.  
 15 Defendant's objection to the second set of questions is also overruled. *See id.* at 3:19–28.  
 16 These questions are primarily clarifying, not leading. But Defendant's objection to the third  
 17 set of questions is sustained. *See id.* at 4:3–7. The Government's questions there are  
 18 impermissibly leading because they supply large amounts of information and require only  
 19 yes or no answers. The Court will direct the Government to redact or otherwise omit the  
 20 testimony of Material Witness Juarez-Franco with respect to those questions.

## 21 **II. Prior Convictions MIL (Doc. 104).**

22 The Government seeks to admit two of Defendant's prior felony convictions for drug  
 23 offenses and an associated failure to appear. Doc. 104 at 1–2. Defendant was sentenced in  
 24 2011 to imprisonment for concurrent terms of ten years, nine months, five years, and three  
 25 years for these offenses. *See id.* Defendant was released on parole from the longest of these  
 26 convictions in July 2021. *See id.* The Government also submits that it does not oppose  
 27 sanitizing the convictions. *See id.* at 3.

28 A prior conviction may be used to impeach a defendant at trial if (1) the prior crime

1 is one punishable by imprisonment in excess of one year; (2) less than ten years has passed  
 2 since the date of conviction or release from confinement imposed for that conviction; and  
 3 (3) the probative value of admitting the evidence outweighs its prejudicial effect on the  
 4 accused. Fed. R. Evid. 609. To determine whether the probative value outweighs the  
 5 prejudicial effect, the Court considers: (1) the impeachment value of the prior crimes; (2)  
 6 the point in time of the convictions and the witness' subsequent history; (3) the similarity  
 7 between the past crimes and the charged crime; (4) the importance of the defendant's  
 8 testimony; and (5) the centrality of the credibility issue. *United States v. Browne*, 829 F.2d  
 9 760, 762–63 (9th Cir. 1987).

10 If Defendant takes the stand to contest his guilt, his prior convictions will be  
 11 admissible under the Federal Rules of Evidence and the *Browne* factors. First, Defendant's  
 12 convictions were punishable by more than one year. That is true even though punishment  
 13 for one offense was less than one year. Second, Defendant's release from confinement was  
 14 less than ten years ago for each of his convictions. Third, the probative value outweighs  
 15 the prejudicial effect because (1) prior convictions for drug offenses are probative of  
 16 truthfulness, (2) Defendant was arrested for his current charged crimes shortly after being  
 17 released from his previous convictions, (3) the past crimes and the charged crimes are  
 18 different, and (4) and (5) Defendant's testimony and credibility—should he take the  
 19 stand—will be central to his defense.

20 Defendant objects that his prior convictions are more prejudicial than probative  
 21 because he was convicted more than ten years ago, and because the crimes were different  
 22 from those charged in this case. *See* Doc. 128 at 4. Defendant asks the Court at least to  
 23 sanitize the convictions. *Id.* Defendant's objections are overruled because (1) a conviction  
 24 is admissible if the *release* is less than ten years old, and (2) the prejudicial effect is  
 25 *decreased*, not increased, by the dissimilarity between the charged offense and convicted  
 26 offenses. *See United States v. Browne*, 829 F.2d 760, 763 (9th Cir. 1987). Because the  
 27 prejudicial effect is decreased by dissimilarity, the Court will not sanitize the convictions.  
 28 But the Court will add a limiting instruction directing the jury to consider Defendant's prior

1 convictions for impeachment purposes only.

2 **III. Order**

3 Accordingly,

4 **IT IS ORDERED GRANTING IN PART** the Government's Video Deposition  
5 MIL (Doc. 103), consistent with this Order's reasoning and citation.

6 **IT IS FURTHER ORDERED GRANTING** the Government's Prior Felony MIL  
7 (Doc. 104).

8 Dated this 2nd day of July, 2024.

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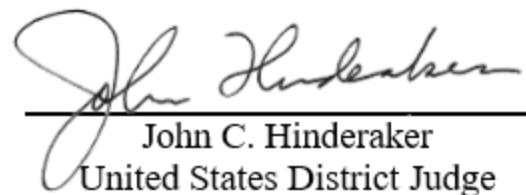
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John C. Hinderaker  
United States District Judge